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Supreme Court of the United States

OCTOBER TERM, 1987

PHILLIP D. TOMPKINS,

Petitioner,

—v.—

STATE OF TEXAS,

Respondent.

ON WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE TEXAS CIVIL LIBERTIES UNION, AND THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members dedicated to the defense of individual rights, including the principle of racial equality embodied in the Constitution. The ACLU of Texas is one of its state affiliates. Of particular note here, the ACLU represented petitioner in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986), the first federal court decision holding that a prosecutor's racially discriminatory exercise of peremptory challenges violates the Constitution.

The NAACP Legal Defense and Educational Fund, Inc. is a non-profit

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1/ Letters of consent have been filed with the Clerk of the Court, pursuant to Rule 36.2 of the Rules of this Court.

corporation established in 1939 to assist blacks to secure their constitutional rights. The Fund has a long-standing concern with the exclusion of blacks from service on juries. Thus, it has raised jury discrimination claims on appeal from criminal convictions,[2] pioneered in the affirmative use of civil actions to end discriminatory jury practices,[3] and represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude blacks from jury venires.

Both the ACLU and NAACP Legal Defense Fund participated as amicus in Batson v. Kentucky, 476 U.S. 79 (1986),

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2/ E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

3/ Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1972); Mitchell v. Johnson, 250 F.Supp. 117 (N.D.Ala. 1966).

and both organizations are deeply concerned about the proper implementation of Batson in trial courts throughout the country. In particular, amici believe that the decision below jeopardizes the principle of equal justice that the decision in Batson was meant to protect.

Accordingly, we submit this brief in support of petitioner but limit our attention to the Batson question presented for review.

STATEMENT OF THE CASE

Petitioner Tompkins is a black man who was tried and sentenced to death by an all-white jury prior to Batson v. Kentucky, 476 U.S. 79 (1986).[4] At Tompkins' trial, the venire contained 13 black prospective jurors. Eight of the

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4/ Amici adopt petitioner's statement of facts, but highlight those points of greatest relevance to the discussion below.

thirteen were successfully challenged for cause. The remaining five black jurors were barred from jury service by the prosecutor's use of peremptory challenges.

After jury selection was completed and before the presentation of any evidence, petitioner moved to quash the jury. Relying on Swain v. Alabama, 380 U.S. 202 (1965), the trial judge denied petitioner's motion without any inquiry into the prosecutor's actions. Thus, there is no contemporaneous explanation of the prosecutor's reasons for his peremptory challenges.

Batson was decided while petitioner's appeal was pending in the Texas Court of Criminal Appeals. The case was then remanded to the trial court, which conducted a Batson hearing six years after the original voir dire.

Upon finding that petitioner had established a prima facie case of discrimination under Batson,[5/] the trial judge asked the prosecutor to state the reasons for his peremptory challenges. The trial judge did not, however, compare the proffered reasons with the record of the original voir dire. Thus, she failed to consider the disparate treatment of white and black members of the venire.

Moreover, the trial court failed to consider evidence documenting a systemic pattern of discrimination against black jurors in Harris County. For example, the record revealed that black jurors

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5/ The court below affirmed this finding and respondent does not dispute it here. Slip Op. at 6. (References to the opinion of the Texas Court of Criminal Appeals,, which was unreported, will be to "Slip Op.," followed by the page number of the manuscript slip opinion. As of the date of filing, amici could not provide joint appendix cites to the Court of Criminal Appeals' opinion, because the joint appendix had not yet been printed).

were routinely excluded by at least one former Harris County Assistant District Attorney in every capital case involving a black defendant. Batson Hearing Transcript at 9. A chief prosecuting attorney with the Harris County District Attorney's Office testified during petitioner's Batson hearing that he had advised junior prosecutors to "beware of selecting minorities [as jurors] ... because they are not likely to feel as ingratiated towards you as a prosecutor ... [and] because essentially so many ... of the people we prosecuted ... [were] members of the black community." Id. at 19.

The chief prosecuting attorney also testified:

> [W]hen I was ... growing up in the D.A.'s Office ... I was told ... and it was historically true that everybody knew that the police had a terrible experience with minority communities, both black and Mexicans [sic]. In trying to serve an individual family or victim, you wanted to ... be careful that you did not make mistakes and have a juror that would hurt you ... and you would have to, because of the [voir dire] time limit, make generalizations about people and the fact that someone was a member of a minority group was a general characterization that I would make about ... prospective veniremen.

Id. at 29-30.

Consistent with this testimony, the principal prosecutor in petitioner's case admitted that "everybody" in the district attorney's office "talk[ed] about" race as a factor in juror selection during his tenure, that the juror's race vis-a-vis the defendant's race is "something you have to look at" during jury selection. Id. at 162-63.

Despite this evidence, the trial judge accepted at face value the prosecutor's reasons for excluding every potential black juror from petitioner's trial and concluded that those reasons

were constitutionally sufficient. Specifically, the trial court found that the prosecutor's racial pattern of peremptory challenges was justified by the following explanations: 1) two potential jurors expressed reservations about the death penalty; 2) juror Thomas had difficulty with the law of circumstantial evidence; 3) juror Samuel "had extreme difficulty with legal concepts"; and "though not illiterate, could not satisfactorily fill out juror information sheets and questionnaires"; and 4) juror Green had difficulty with the law of causation and expressed uncertainty regarding the death penalty.6/

The Texas Court of Criminal Appeals

6/ In his petition for writ of certiorari, Tompkins directs the Court's attention to the last three of the five black members of the venire removed through peremptory challenges. Accordingly, amici shall focus primarily upon the prosecution's rebuttal with regard to these three jurors.

expressed serious reservations about several of these post hoc explanations. With regard to Ms. Thomas, who expressed reservations about convicting someone of a capital crime based solely on circumstantial evidence, the prosecutor justified his exclusion by asserting that his case depended solely on circumstantial evidence and thus Thomas' views endangered his case. **Slip Op. at** 10. However, as the Court of Criminal Appeals correctly noted, at the time of voir dire the trial court had ruled petitioner's signed confession admissible. Id. It was only after voir dire that the confession was ruled inadmissible because of the intervening decision in Edwards v. Arizona, 451 U.S. 477 (1981). Thus, even though the state's case eventually became wholly circumstantial, at the time the

prosecution struck Ms. Thomas, its case was based upon the direct evidence of guilt provided by petitioner's confession.

The Court of Criminal Appeals also expressed substantial concerns about the exclusion of Mr. Green. According to the trial judge, Green was challenged because of difficulty with the concept of causation and qualms about the death penalty. But, as the Court of Criminal Appeals pointed out in its opinion, the only explanation offered by the prosecution for its exclusion of Green was that Green "had been an employee of the United States Postal Service for some thirteen years." Id.

In response to this explanation, the Texas Court of Criminal Appeals stated:

> We have some difficulty understanding the relevancy of a venireperson's employment as a postman employed by the United States Government as far as his qualifications for jury service. Although the prosecuting attorney indicated that "I have not had very good luck with postal employees," she did not elaborate upon her evident bias against such employees. Perhaps, indeed, federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement. But if so, we are not aware of it, nor has the State undertaken to enlighten us further on the subject.

Id. at 11C.

Despite finding several of the prosecutor's explanations to be incredible based on other available evidence, the court below upheld petitioner's conviction out of deference to the "findings" of the trial judge who conducted the Batson hearing. In addition, the court below specifically declined to consider whether whites and blacks were subject to disparate treatment by the prosecution during the voir dire. The court reasoned that "[b]ecause the trial judge was not urged

to make, and did not make, a finding based upon a comparison analysis ... we do not consider this circumstance in reviewing the trial judge's findings in this cause." Id. at 9 n.6A.

SUMMARY OF ARGUMENT

For more than a century, this Court has consistently condemned racial discrimination in the selection of juries. But, as the Court recognized only two terms ago in Batson v. Kentucky, 476 U.S. 79, 92 (1986), the ideal of equality embodied in the Fourteenth Amendment can often be defeated by "crippling burden[s] of proof." Thus, in Batson, the Court overruled its earlier holding in Swain v. Alabama, 380 U.S. 202 (1965), that required proof of a widespread pattern or practice in order to establish racial discrimination in the use of peremptory challenges. Instead,

the Court held that a prosecutor's discriminatory exercise of peremptory challenges in even a single case violates the Equal Protection Clause.

Batson thus represented a "historic step" toward the final elimination of racial discrimination in jury selection. 476 U.S. at 102 (Marshall, J., concurring). At the same time, it represented only a "step." What was gained in Batson will quickly be lost unless the state's obligation to produce a nonracial explanation for its peremptory challenges is taken seriously once a prima facie case of discrimination is established.

This does not mean that a prosecutor's explanation must rise to the level of cause or that lengthy Batson hearings will now be required. It does mean that a prosecutor's explanation

cannot be accepted at face value if there is other evidence in the record suggesting that the explanation is pretextual. Obviously, that judgment must be made in the first instance by the trial judge. In making its judgment, however, it is incumbent on the trial court to view the record as a whole rather than focus on the prosecutor's explanation in isolation.

The tools for detecting pretext in a discrimination case are neither novel nor difficult to utilize. At a minimum, the trial court should consider whether black jurors are being excluded for reasons that are equally applicable to white jurors who are permitted to serve, whether the reasons offered for the prosecutor's challenge are case-related, whether the reasons offered are clear and reasonably specific, and whether the

prosecutor has a longstanding pattern or practice of excluding black prospective jurors for racial reasons or other history of racial discrimination. Taken together these principles call for a determination of the credibility of the prosecutor's explanation on the basis of the entire record.

In this case, the trial court's truncated inquiry began and ended with the determination that the state's explanations for its peremptory challenges were facially neutral. The trial court never considered whether other evidence in the record cast doubt on the validity of the prosecutor's post hoc rationalization. The trial court's error was then compounded by the Texas appellate court, which deferred to the trial court's "fact-findings" without recognizing its constitutional duty to

ensure that the trial court's fact-finding process had given careful scrutiny to the prosecutor's reasons for excluding black prospective jurors.

As Justice Marshall aptly observed in his concurring opinion, the decision in Batson will amount to very little if "easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his [peremptory] strikes on nonracial grounds." 476 U.S. at 106. This case offers the Court an important opportunity to prove that the promise of Batson has actual meaning in the real world.

ARGUMENT

Introduction

There is no dispute, nor could there be, that petitioner established a prima facie case of racial discrimination in

the prosecutor's use of peremptory challenges. Once such a case was established, "the burden shift[ed] to the State to come forward with a neutral explanation for challenging black jurors." Batson v. Kentucky, 476 U.S. at 97. The dispute presented by petitioner's case centers upon the degree to which the trial courts must scrutinize the state's "neutral explanation for challenging black jurors." Plainly, Batson "requires trial courts to be sensitive to the racially discriminatory use of peremptory challenges...." Id. at 99. The question to be resolved is the scope of the trial court's duty "to be sensitive."

I.

BATSON IMPOSES AN AFFIRMATIVE OBLIGATION UPON TRIAL COURTS TO ENSURE THAT PROSECUTORS DO NOT EXCLUDE BLACK JURORS FOR RACIAL REASONS, REQUIRING THOSE COURTS TO VIEW WITH SUSPICION AND

CAREFULLY SCRUTINIZE PROSECUTORS' REASONS FOR EXCLUDING BLACK JURORS ONCE A PRIMA FACIE CASE OF DISCRIMINATION HAS BEEN MADE

This Court's decision in Batson "adopt[ed a standard] under the Federal Constitution ... designed to ensure that a State does not use peremptory challenges to strike any black juror because of his race." Batson, 476 U.S. at 89 n.22. Such a rule was required because "the practice of peremptorily eliminating blacks from petit juries in cases with black defendants remains widespread." 476 U.S. at 101 (White, J. concurring). The evil meant to be eradicated by this Court's ruling, "[t]he [e]xclusion of black citizens from service as jurors[,] constitutes a primary example of the evil the Fourteenth Amendment was designed to cure." 476 U.S. at 85. That evil is one

not only of injustice to the defendant on trial, but to the excluded juror and, indeed, the entire community as well. "Selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice." 476 U.S. at 81.

Although the Court in Batson did not set forth any specific procedures that must be followed to implement the rule established, it did make clear that its decision imposed on trial judges the duty to "supervis[e] voir dire in light of [the Court's] decision," 476 U.S. at 89, n.22, and to "conscientiously [perform] their respective duties under the Constitution," id. at 89. "By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, [the Court's] ... decision

enforces the mandate of equal protection and furthers the ends of justice." Ibid.

The duty imposed on trial judges in this context is no greater than that imposed in other contexts in criminal cases where federal constitutional rights involving the very integrity of the judicial process are concerned. See, e.g., Boykin v. Alabama, 395 U.S. 238 (1969) (trial judge must conduct a thorough inquiry into defendant's understanding of guilty plea); Pate v. Robinson, 383 U.S. 375 (1966) (trial judge must sua sponte conduct inquiry into defendant's competency if evidence before him suggests defendant may be incompetent).7/ It cannot be questioned

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7/ As one federal court has noted, "[t]he process of identifying discriminatory conduct and pretextual explanations is performed daily in the course of litigation under ... a host of ... statutes. It should not be considered unduly burdensome ... when a defendant's life is at (continued...)

that what is at stake in the selection of a petit jury in a capital trial is as fundamental to the integrity of that trial as the defendant's competence or the voluntariness of a plea. Indeed, the rule in Batson was the result of this Court's acknowledgment that there was a real and present "risk that the factor of race may enter the criminal justice process" through the prosecutor's use of peremptories in selecting the jury, and the Court's "recognition that 'the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice.' Ex parte Milligan, 4 Wall 2, 18 L.Ed. 281 (1866)." McCleskey v. Kemp __ U.S. _____, 95 L.Ed.2d 262, 290

7/ (...continued)
stake." McCray v. Abrams, 750 F.2d 1113, 1132 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986).

(1987).[8]

The trial court cannot fulfill its important responsibility to safeguard the integrity of the process if it does not "undertake 'a sensitive inquiry into such circumstantial and direct evidence of intent [to discriminate] as may be available.'" Batson, 476 U.S. at 93 (quoting Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977)). In particular, once a prima facie case of discrimination has been presented, "the trial court must undertake a 'factual

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8/ This concern has special force in a death penalty case, for as the Court explained in Turner v. Murray, 476 U.S. 28, 35 (1986), "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.... The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence."

inquiry' that 'takes into account all possible explanatory factors' in the particular case. Alexander v. Louisiana, supra, at 630." 476 U.S. at 95 (emphasis supplied).

At issue here is the extent of the inquiry to be undertaken by the trial court once a prima facie case of discrimination has been proved. Such proof raises a mandatory inference of purposeful discrimination, which must be rebutted by the state. Batson, 476 U.S. at 95. When the trial court conducts its inquiry, therefore, it must be from the perspective of suspicion of the prosecutor's actions, for the presumption that the prosecutor has performed in conformity with constitutional requirements has been destroyed by the defendant's prima facie case of discrimination. In addition, direct

evidence of historical discrimination by the prosecutor's office, such as that presented by Mr. Tompkins, should prompt the trial court to seriously question the prosecutor's actions. From such a perspective, it is wholly inappropriate merely to accept a prosecutor's facially racially neutral explanations for his striking of black members of the venire without further probing.

It would seem self-evident that any meaningful inquiry into the prosecutor's use of peremptory strikes of black prospective jurors would involve a review of the voir dire as a whole to determine whether the prosecutor treated blacks differently than whites and whether his asserted reasons for striking blacks applied equally to whites who were not

struck.[9] In a case such as Mr. Tompkins', where a transcript of the voir dire was readily available for the trial

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[9] Indeed, many lower courts have done precisely that. See Floyd v. State, 511 So.2d 762, 764-65 (Fla.App. 1987)(disparate treatment of white and black jurors provides "strong evidence" that prosecutor's explanation "is a subterfuge to avoid admitting use of the peremptory challenges"); State v. Gilmore, 511 A.2d 1150, 1168 (N.J. 1986)(holding that "[t]he only real difference between the . . . [challenged] black . . . and [unchallenged] white [prospective jurors] was their race," where prosecutor "fail[ed] to exercise peremptory challenges to remove white prospective jurors who possessed the same characteristics as black prospective jurors who were stricken); United States ex rel. Yates v. Hardiman, 656 F.Supp. 1006, 1009-10 (N.D.Ill. 1987)(ordering new trial where record revealed, inter alia, that "[t]he characteristics of the Negroes excluded were similar to those of non-Negroes who sat on the jury" and that "[t]he only characteristic . . . [the excluded black venire members] had in common was their race"); Roman v. Abrams, 822 F.2d 214, 228 (2d Cir. 1987)(rejecting as pretextual "an explanation [offered] for some of the challenges to White prospective jurors . . . [and not similarly used to challenge] non-white prospective jurors"); Gamble v. State, 357 S.E.2d 792, 796 (Ga. 1987)(noting "suspect[ness]" of prosecutor's proffered explanations where "similarly situated white jurors were not challenged, and citing this fact in support of holding that "the trial court's finding that the prosecutor successfully rebutted the prima facie Batson case is clearly erroneous").

court's review, it is inexcusable that such a review was not undertaken given the importance of the task assigned to the trial court.[10] A review based solely on demeanor cannot be countenanced when the prosecutor's explanations can be tested easily and objectively by reference to his actions.[11]

A reading of this Court's opinion in Batson suggests the kind of inquiry the trial court ought to conduct of the prosecutor's proffered explanations for

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10/ The trial court's obligation to review the voir dire is independent of any obligation defense counsel may have to bring it to the court's attention. The contrary conclusion by the Texas Court of Criminal Appeals, see p.12, supra, is further evidence that the Texas courts misunderstood their obligations under Batson once a prima facie case of discrimination has been established.

11/ In the usual post-Batson case, where the prosecutor will be required to justify his exclusion in the midst of voir dire, the comparison to the prosecutor's actions with respect to white jurors is just as important and can be readily accomplished.

his strikes of black members of the venire. First, the trial court should demand an explanation that is clear and reasonably specific. Without such an explanation, no evaluation of the prosecutor's true motives may be made. Second, the trial court should determine whether the explanation is one which links the asserted deficiency of the black prospective juror to some aspect of the prosecutor's case. An objection based on other grounds is unacceptable under Batson, 476 U.S. at 98 ("[t]he prosecutor ... must articulate a neutral explanation related to the particular case to be tried") (emphasis supplied). Finally, the trial court should determine if the explanation is credible. The credibility determination should be based not solely on the prosecutor's demeanor, but also on an assessment of the

plausibility of the explanation when viewed in the context of the voir dire as a whole, i.e., whether the explanation for striking the black member of the venire would apply equally to a white member of the venire the prosecutor accepted.

As the Court noted in Batson, "[i]n those States applying a version of the standard ... [enunciated in Batson,] courts have not experienced serious administrative burdens, and the peremptory challenge system has survived." 476 U.S. at 99 (footnote omitted). The kind of inquiry suggested by amici would not require more than the practice in those states. Yet without such an inquiry, the promise of Batson will be vain and illusory.

II.

HAD THE TRIAL COURT APPLIED THE NECESSARY DEGREE OF SCRUTINY TO THE PROSECUTION'S TESTIMONY IN THE BATSON HEARING, IT WOULD HAVE FOUND THAT THE PROSECUTION ENGAGED IN UNCONSTITUTIONAL DISCRIMINATION ON THE BASIS OF RACE

The transcript of the Batson hearing discloses that the trial judge did not engage in a searching examination of the prosecution's explanations. Rather, she accepted the prosecution's explanations at face value and found that they presented racially neutral reasons for the exclusion of jurors Thomas, Samuel and Green. If the trial judge had instead given the careful scrutiny to the prosecution's assertions that the Constitution requires, she would have determined that the explanations were not racially neutral, but instead were mere pretexts for the exclusion of these jurors on account of their race.

In arriving at its decision, the trial court failed to consider petitioner's substantial evidence regarding the Harris County District Attorney's longstanding practice of excluding prospective black jurors through the use of peremptory challenges. The motivation underlying this practice was explained by a chief prosecuting attorney: attorneys in his office were taught to "beware of selecting minorities [as jurors] ... because they are not likely to feel as ingratiated towards you as a prosecutor ... [and] because essentially, so many ... of the people we prosecuted ... [were] members of the black community." Batson Hearing Transcript at 19.

This explanation, which informed the decisions to exclude black jurors in Mr. Tompkins' trial, is an explanation which

the Court expressly rejected in Batson as racially neutral:

> [T]he prosecutor may not rebut the defendant's prima facie case of discrimination by stating merely that he challenged jurors of the defendant's race on the assumption -- or his intuitive judgment -- that they would be partial to the defendant because of their shared race.... The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

476 U.S. at 97 - 98.

Had the trial court considered such evidence, it would have cast such serious doubt on the plausibility of the prosecution's explanations that the trial court would have been compelled to engage in more searching scrutiny of the prosecution's explanations. Further scrutiny would have produced unequivocal

evidence that the specific reasons given for the exclusion of jurors Thomas, Samuel and Green were merely pretexts for racially-motivated exclusions.

The trial judge initially failed to consider this unequivocal evidence by failing to compare the reasons offered for excluding jurors Thomas, Samuel and Green with the voir dire of white jurors. If the judge had undertaken this comparison, she would have found that the very reasons offered as justifications for the exclusion of the black jurors did not lead the prosecutor to exclude white jurors. Such disparate treatment is classic evidence of pretextual explanations for racially motivated decision-making.

As described in the Statement of the Case, the trial judge found that prospective jurors Thomas, Samuel, and

Green were properly excluded, inter alia, because they had difficulty with legal concepts such as circumstantial evidence and causation, and because their non-verbal responses to voir dire questions were "inarticulate." However, as petitioner demonstrated in his Supplemental Brief presented to the Court of Criminal Appeals, white jurors "selected for the trial also had problems with the issue of circumstantial evidence, causation and other areas of the law," Supp. Brief at 5, and also responded non-verbally to questions. Id. at 6. Indeed, the Court of Criminal Appeals noted that since most jurors suffered the same disabilities, such a comparison refuted the prosecutor's professed explanations at the Batson hearing.12/

12/ "[I]t is not uncommon for . . . venirepersons to appear inarticulate, confused, and tentative (continued...)

Further, the trial judge failed in her obligation to determine whether the prosecutor had given "clear and reasonably specific" explanations for the purportedly non-racial reasons for excluding the black jurors. Batson, 476 U.S. at 98 n.20. The reasons for excluding juror Green, in particular, would not have survived scrutiny under this principle. When asked during direct examination to explain why she exercised a peremptory challenge against Mr. Green, a member of the prosecution team said she "could tell from questions [she] asked and answers that [she] got why [she] would not want him on the jury." Her subsequent testimony provided little illumination as to the specific responses

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12/ (...continued)
[about] legal definitions and concepts, which are usually alien to most venirepersons." Slip Op. at 11B.

Mr. Green gave to cause such consternation.13/

The only specific reason given by the prosecuting attorney for excluding Mr. Green was that his employment disturbed her:

> I noticed that he had two years of college but had worked for thirteen and a half years ... for the U.S. Postal Service which, if nothing else, in his favor or against him, is kind of an alert to me, because I have not had very good luck with postal employees.... I noticed his wife also worked for the Post Office and I ... circled that on the juror card.

Batson Hearing Transcript at 208 (emphasis supplied).

13/ Batson Hearing Transcript at 208. The transcript reveals only that the prosecutor felt that Mr. Green had "flip flopped" during voir dire and that she believed that "he was not a very articulate person" because he responded to some of her questions with "either shakes, nods, yeah, I guess or uh-huh." See generally, id. at 209-14. As we have already noted, white jurors who responded in a similar fashion were not excluded for this reason.

However, during cross-examination, the prosecutor admitted that she "sometimes" had good luck with postal workers. Id. at 214. When she realized that this testimony might undermine her initial statement that her superstition about postal workers partially accounted for her challenge to juror Green, the prosecutor embellished her explanation with a belated suggestion that the Mr. Green's lack of ambition was the actual source of her concern.[14/] Such internal inconsistency made it impossible to conclude that the proffered explanation was either "clear" or "reasonably specific."

The trial judge further failed to assess whether the reasons given for the

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14/ The prosecutor said she was "curious as to why someone with two years college education would be a messenger for ten years." Id. at 216.

exclusion of some jurors were related in any way to the case being tried. With respect to juror Green, the prosecutor never attempted to explain how her generalized fears about postal employees, or her ostensible concern about Mr. Green's progress in employment were related in any way to petitioner's case. There is similar silence in the record about the relevance of Mr. Green's wife's employment. As the Court of Criminal Appeals observed, "[if] federal postal employees share a common view of the criminal justice system antithetical to the interests of law enforcement[,] ... we are not aware of it, nor has the State undertaken to enlighten us further on the subject." Slip Op. at 11C. Although the explanation that the challenged venireman was a postal worker is a "neutral" one, it nevertheless violates the Batson re-

quirement that the "neutral explanation" offered by the prosecutor be "related to the particular case to be tried." 476 U.S. at 98 n.11.

Similarly, the prosecutor failed to explain how the exclusion of juror Thomas -- due to her reservations about the use of circumstantial evidence -- legitimately informed the decision to excuse her at the time that decision was made. Even though the state's case later came to be based on circumstantial evidence (because of the subsequent decision to suppress petitioner's confession after Edwards was decided, Slip Op. at 10), at the time juror Thomas was excluded, the state's case was based on direct evidence (i.e., the confession). At that time, therefore, the purported reason for excluding her was wholly unrelated to the particular case to be tried.

Finally, the trial court's assessment of the prosecutors' credibility -- admittedly an important element of any Batson inquiry -- appears in this case to have been entirely divorced from any examination of the record as a whole. Had the record been examined in light of the principles designed to distinguish between pretext and legitimate, non-racial explanation, the trial court could have reasonably reached only one conclusion: that the prosecution's purportedly non-racial explanations were incredible and were merely pretexts for discrimination.

III.

WHERE A PRIMA FACIE CASE OF DISCRIMINATION HAS BEEN MADE, AN APPELLATE COURT REVIEWING BATSON FACT-FINDINGS CANNOT DEFER TO THOSE FACT-FINDINGS UNLESS THEY HAVE BEEN MADE IN A PROCEEDING WHICH HAS CAREFULLY SCRUTINIZED, ON THE BASIS OF THE ENTIRE RECORD, THE PROSECUTOR'S REASONS FOR EXCLUDING BLACK JURORS

As previously noted, the Court of Criminal Appeals expressed severe reservations regarding the prosecution's explanations for peremptorily striking three black members of the venire. It nevertheless deferred to the trial judge's conclusions and declined to examine evidence of disparate racial treatment contained in the record and outlined in petitioner's Supplemental Brief. By misunderstanding its duty to engage in a full review of the record in order to ascertain whether the trial court's findings were based upon careful scrutiny of the prosecutor's explanations

for excluding black jurors, the appellate court eviscerated this Court's holding in Batson.

In Batson, this Court noted

> that 'a finding of intentional discrimination is a finding of fact' entitled to appropriate deference by a reviewing court. Anderson v. Bessemer, 470 U.S. 564, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985). Since the trial judge's findings in the context [of racial discrimination in a prosecutor's use of peremptory juror strikes] largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference. Id. at 575-6, 84 L. Ed.2d 518, 105 S.Ct. 1504.

476 U.S. at 98 n.21. However, the deference required by Anderson v. Bessemer, 470 U.S. 564 (1985) cannot be construed to compromise the scrutiny required by Batson. At the very least, Bessemer adopts the "clearly erroneous" standard of United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), which holds that "[a] finding is 'clearly

erroneous' when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Emphasis added.)

Thus, contrary to the approach below, whatever deference is owed by an appellate court to a trial court is clearly contingent on the appellate court's review of the entire record in order to ascertain that the trial court's findings have been based upon careful scrutiny of the prosecutor's explanations for excluding black jurors. Indeed, this Court has often engaged in a similar form of review in other cases of alleged discrimination in the selection of juries. See Norris v. Alabama, 294 U.S. 587 (1935); Avery v. Georgia, 345 U.S.

559 (1953).[15]

If the appellate court determines that the trial court has scrutinized the entire record, appropriate deference must be given to the trial court's fact-findings. However, if the appellate court

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15/ In both Norris and Avery, the prosecution objected to any review of the facts by this Court. In Norris, the Court responded:

> That the question is one of fact does not relieve us of the duty to determine whether in truth a federal right has been denied.... If this requires an examination of evidence, that examination must be made. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights. Thus, whenever a conclusion of law of a state court as to a federal right and findings of fact are so intermingled that the latter control the former, it is incumbent upon us to analyze the facts in order that the appropriate enforcement of the federal right may be assured.

294 U.S. at 589-90 (citation omitted). In Avery, the Court cited Norris, noting that the Court's reconsideration of the facts must be "based on our independent analysis of the record." 345 U.S. at 561. See also Fiske v. Kansas, 274 U.S. 380, 385-6 (1927); Time Inc. v. Pape, 401 U.S. 279, 284 (1971); and Buckley v. Littell, 539 F.2d 882, 888 (1976)(holding that review of evidence applies at all levels of appellate review).

determines that the trial court has failed to scrutinize the entire record, no deference can be given to the trial court's fact-findings, and the appellate court must remand for a new fact-finding proceeding or, if the record permits, make the fact-findings supported by the record. Unless appellate review conforms to these principles, the rights secured by Batson will be lost. It is, therefore, "incumbent upon [the appellate courts] to analyze the facts in order that the appropriate enforcement of the federal right may be assured." Norris v. Alabama, 294 U.S. at 590.

Here, the Texas Court of Criminal Appeals rejected the trial court's reasoning but rubber stamped the result. Its own opinion documented the ways in which the trial court had failed to scrutinize the prosecutor's explanations

for the exclusion of black jurors on the basis of the entire record. Not realizing that the trial court was bound by Batson to have done so, see n.10, supra, the appellate court did not understand its own duty, under Batson, to give no deference to the trial court's fact-findings. Its obligation under Batson -- on this record -- required it to find that the prosecutor's "neutral" explanations disguised his true racial motivation. Its failure to fulfill its obligation violated petitioner's federal constitutional rights, and made a mockery of Batson.

CONCLUSION

For the reasons stated herein, the decision below should be reversed.

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